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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Low-Volume Long-Distance Users	)	CC Docket No. 99-249
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

U S WEST COMMUNICATIONS' PETITION FOR PARTIAL STAY

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SUMMARY

By this petition, U S WEST seeks a stay of that portion of the recently released *CALLS Order* that requires U S WEST to elect to opt in or out of the CALLS access-charge pricing plan within 60 days of the release of the order (by July 30, 2000). U S WEST seeks a stay of this provision until 60 days after the Commission defines the key terms of the cost-based alternative to the CALLS plan offered to price cap LECs like U S WEST. This stay would not affect implementation of the overall CALLS plan.

Because the Commission declined to make the CALLS proposal mandatory for U S WEST, the *CALLS Order* provides an access charge pricing option as an alternative to certain rate-level components of the CALLS proposal. This cost-based option, however, would require U S WEST to operate under a forward-looking cost model, X-factor and price cap plan that are completely undefined in the *CALLS Order* and which the Commission promises to develop at a later time. In light of (1) the enormous scope of potential consequences flowing from the required election, (2) the fact that the cost-based option with so many undefined key terms is not a viable option, and (3) the irreparable harm that U S WEST will suffer by being forced to select between two revenue-reducing options where one option will reduce its revenue by an unknown but potentially huge amount, it is manifestly unfair and an abuse of discretion to require U S WEST to make its election before it knows the terms and impact of the cost-study option alternative.

This petition meets the legal test necessary for the Commission to grant the requested stay because: (1) U S WEST is likely to succeed on the merits on review; (2) U S WEST would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.

RELIEF REQUESTED

U S WEST Communications, Inc. ("U S WEST") requests that the Commission stay one narrow portion of its Sixth Report and Order in CC Docket Nos. 96-262 (*Access Charge Reform*) and 94-1(*Price Cap Performance Review for Local Exchange Carriers*), Report and Order in CC Docket No. 99-249 (*Low-Volume Long-Distance Users*), and Eleventh Report and Order in CC Docket No. 96-45 (*Federal-State Joint Board on Universal Service*) (rel. May 31, 2000), FCC 00-193, 2000 FCC LEXIS 2807 (the "*CALLS Order*").[1] Specifically, U S WEST seeks a stay of the requirement that it elect within 60 days from the date of issuance of the Order (in other words, by July 30, 2000) whether to opt in or out of the proposal put forth by the Coalition for Affordable Local and Long Distance Service ("CALLS") and adopted by the Commission. This election will be binding for the full five-year term of the CALLS proposal. U S WEST seeks to postpone the deadline for election until 60 days after the Commission clarifies key aspects of the cost-based, opt-out alternative. In particular, the Commission has failed to define the forward-looking cost model, X-factor and price cap plan that it intends to apply to those local exchange carriers ("LECs") who choose not to subscribe to the CALLS proposal. Because these undefined elements have enormous financial impact, U S WEST cannot make an informed election until the Commission defines them.

U S WEST filed a petition for judicial review with the United States Court of Appeals for the District of Columbia Circuit on June 27, 2000, and anticipates seeking a stay from that court if the Commission denies this petition. To ensure that the court has sufficient time to receive and act on such a motion before U S WEST must make its election, U S WEST respectfully requests that the Commission rule on this petition no later than July 6, 2000.

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[1] The Commission issued an Errata to this order on June 14, 2000. 2000 FCC LEXIS 3064.

BACKGROUND

On May 31, 2000, the Commission released a Report and Order adopting in large part an integrated access reform and universal service proposal negotiated by CALLS. CALLS consists of AT&T Corporation, Bell Atlantic Telephone Companies, BellSouth Corporation, GTE Service Corporation, SBC Communications Inc., and Sprint Corporation. The *CALLS Order* sought to resolve a number of long-standing issues related to access charges and universal service.

CALLS first submitted its proposal to the Commission on July 29, 1999. It modified the proposal on March 8, 2000, and continued with modifications until the Commission adopted the *CALLS Order*. The Commission requested and received comments relating to the different versions of the proposal. The CALLS proposal was the subject of intense negotiations, both within the coalition and between the CALLS proponents and the Commission. Significant industry carriers, such as MCI WorldCom and some competitive local exchange carriers ("CLECs"), did not participate at all. U S WEST participated in some of the discussions and meetings with the Commission's staff, but was not included in many others because it was unwilling to sign on to the proposal.

In the *CALLS Order*, the Commission imposed the rate-structure components from the CALLS proposal on all price cap LECs for the full five-year period of the proposal. The Commission also required all price cap LECs to file tariffs in accordance with the CALLS plan to be effective as of July 1, 2000.[2] For price cap LECs like U S WEST that were not members of CALLS, the Commission offered two options for certain rate-level, as opposed to rate-structure, components: (1) subscribe to the CALLS proposal; or (2) be bound by the CALLS rate-level components on an interim basis, subject to true-up, and submit a cost study based on forward-looking economic costs that will result in rates being reinitialized to the

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[2] *CALLS Order* ¶ 268.

appropriate level and then made subject to an X-factor and price cap plan to be determined by the Commission.

The Commission explained in the *CALLS Order* that in the 1997 *Access Charge Reform Order*,[3] it had required price cap LECs to submit forward-looking cost studies by February 8, 2001, for access services that were not subject to competition. The Commission further said that it had expressed in that order its intention to prescribe rates for those services based on forward-looking economic costs. In the *CALLS Order*, the Commission stated that those carriers that reject the CALLS proposal, "will operate under the framework the Commission set forth in the *Access Charge Reform Order*."[4] For those price cap LECs that opt out of the CALLS proposal and elect the cost-study option, the Commission said, it would later provide a true-up mechanism to adjust rates as necessary after the Commission establishes permanent rates based on forward-looking costs.[5]

Contrary to the implication in the *CALLS Order*,[6] the *Access Charge Reform Order* did not provide a framework for setting cost-based rates. The *Access Charge Reform Order* provided only that price cap LECs were each to file a study demonstrating the forward-looking costs of providing interstate access services and to do so no later than February 8, 2001.[7] It was silent as to the action, if any, that the Commission intended to take based on

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[3] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*"), *aff'd sub nom., Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[4] *CALLS Order* ¶ 60.

[5] *CALLS Order* ¶ 62.

[6] *CALLS Order* ¶ 60.

[7] *Access Charge Reform Order* ¶ 267.

these cost studies and said nothing concerning the methodology that the Commission intended to apply to set rates.

The Commission recognized that the decisions reflected in the CALLS Proposal may have favored those price cap LECs that were signatories to CALLS:

> These decisions necessarily pit each price cap LEC's interest against the interests of all other price cap LECs. Consequently, price cap LECs that did not agree to the CALLS Proposal might not receive the same benefits or carry the same burdens as the CALLS LEC signatories.[8]

Accordingly, stating that it was acting out of "an abundance of caution," the Commission provided "an opportunity for price cap LECs to choose between two options": the CALLS plan and a cost-based alternative.[9] However, as a practical matter, the *CALLS Order* failed to provide any such choice since it did not provide the information necessary to make the cost-based option a viable alternative. Specifically, the *CALLS Order* failed to define: (1) the forward-looking cost model that U S WEST must submit, (2) the size and basis for the X-factor, and (3) the price cap plan that the Commission intends to apply.

Because the *CALLS Order* failed to define these key elements of the cost-study alternative, U S WEST is unable to make a reasoned decision whether or not to participate in the CALLS proposal. Making this dilemma worse, the financial implications of these undefined elements are enormous. For example, a change of only one percent in the X-factor translates into approximately $25 million of annual revenue to U S WEST.[10] Accordingly, U S WEST seeks a stay of that portion of the *CALLS Order* that requires it to make this election within 60 days from the release of the Order. It requests that the Commission allow it

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[8] *CALLS Order* ¶ 56.

[9] *CALLS Order* ¶ 57.

[10] *See* Declaration of Garrett Y. Fleming ("Fleming Decl.") ¶ 6. One percent of U S WEST's interstate access revenue requirement of approximately $2.5 billion is approximately $25 million.

to make the election within 60 days after the Commission has adequately defined these key elements of the cost-study option. U S WEST suggests that the Commission define these elements expeditiously so that U S WEST and other price-cap LECs may make an informed election as soon as possible.

ARGUMENT

The Commission's standards for granting a stay of an order are well established. As the Commission stated in its Order in CC Docket Nos. 96-262 (*Access Charge Reform*), 94-1 (*Price Cap Performance Review for Local Exchange Carriers*), 91-213 (*Transport Rate Structure and Pricing*), and 95-72 (*End User Common Line Charges*), FCC 97-216 (rel. June 18, 1997) ("*Access Charge Reform Stay Order*") ¶ 4 (footnote in original),

> In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate that (1) they are likely to succeed on the merits on review;[11] (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.

U S WEST satisfies this test.

U S WEST is likely to succeed on the merits of its claim that the Commission failed to properly define the cost-study alternative to opting into the CALLS proposal. Until the Commission properly defines these elements, U S WEST cannot make a reasoned election between subscribing to CALLS or submitting a cost study. The wrong decision would cause irreparable harm by costing U S WEST tens, if not hundreds, of millions of dollars that would not be recoverable.

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[11] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on other factors is particularly strong. *Expanded Interconnection of Local Company Facilities*, 8 FCC Rcd 123, 124 n.10 (1992).

On the other hand, there is no particular reason or time-critical element in the CALLS plan that would require an election within 60 days, and the *CALLS Order* did not attempt to advance one. Because the Commission imposed the CALLS plan on an interim basis on all LECs, the Commission can extend the deadline for non-signatories to opt in or out of the plan without noticeable effect on them or others. The only effect of granting U S WEST's request for stay would be to require the Commission to proceed promptly to designate a cost model and price cap plan, and to justify and set an X-factor – actions it would obviously avoid if the early election deadline holds and no LEC opts out of CALLS.

The stay requested by U S WEST will have no effect on prompt and full implementation of the *CALLS Order*. At the very minimum, U S WEST's challenge raises serious legal issues, and its showing on the other elements is particularly strong so as to justify the entry of the limited stay that U S WEST seeks.

A. The Merits

The *CALLS Order* does not fully develop the elements of the cost-based option. The Commission devoted only a handful of sentences in its 268-paragraph order to this option. None of these sentences sheds any light on the nature of the forward-looking cost model the Commission will require U S WEST to use, the size and basis for the X-factor, or the nature and elements of the price cap plan the Commission intends to impose. As U S WEST explains later, the financial impact of these undefined elements is enormous.

This lack of definition is arbitrary, capricious and an abuse of discretion. It also violates the decision of the Court of Appeals for the District of Columbia Circuit in *United States Tel. Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999) ("*USTA v. FCC*"). The Commission seeks to impose the same X-factor invalidated by that court, without providing the required justification and explanation, merely by changing the X-factor's method of application.

1. Requiring U S WEST to make a binding election to opt in or out of CALLS based upon insufficient information concerning the non-CALLS alternative is arbitrary, capricious and an abuse of discretion.

The *CALLS Order* says price cap LECs opting out of the CALLS proposal must submit "a cost study based on forward-looking economic costs, resulting in the LEC's rates being reinitialized to the appropriate level indicated by the study and then made subject to a price cap plan and X-factor that we would determine."[12] But, the *CALLS Order* does not give any guidance as to what forward-looking cost model, X-factor, and price cap plan the Commission would impose. Unless the Commission clearly defines these elements, a price cap LEC that chooses to opt out will be leaping into the regulatory unknown at significant economic peril. As a practical matter, the vast uncertainty that surrounds the opt-out option renders it no option at all. Only if the Commission provides a definition for each component sufficient to quantify the operation of that component on U S WEST's access charges will U S WEST be able to meaningfully weigh the cost-based option against the choice of participating in CALLS.

Forward-looking cost model. To determine if opting out of the CALLS proposal is in its economic interest, U S WEST must have an in-depth understanding of the type of cost study that will form the basis for its reinitialized rates. The *CALLS Order* states only in the broadest of terms that if a price cap LEC opts out of the CALLS proposal, it must submit a cost study "based on forward-looking economic costs."[13] The order does not attempt to define "forward-looking" or "economic," leaving U S WEST and other price cap LECs to guess as to how the Commission may interpret these terms.

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[12] *CALLS Order* ¶ 59; *see also CALLS Order* ¶¶ 151, 162.

[13] *CALLS Order* ¶ 59.

The specific cost study requirements that the Commission ultimately establishes will have multi-million dollar consequences for U S WEST and other price cap LECs. For example, if the Commission defines "forward-looking economic costs" as requiring a cost study based on the total element long run incremental costs ("TELRIC") of a hypothetical telecommunications network, that definition could cause U S WEST to lean toward participating in CALLS and rejecting the opt-out option. As U S WEST has made clear in other proceedings, the use of TELRIC and costs based on hypothetical networks leads to rates that are confiscatory.[14] On the other hand, if the Commission were to move away from TELRIC and allow studies that develop costs based on something other than a hypothetical network, U S WEST could be more inclined to opt out of CALLS. The Commission must say what cost methodology it intends to use for U S WEST to be able to choose intelligently.

U S WEST's experience in interconnection arbitrations and cost proceedings conducted under the Telecommunications Act of 1996[15] confirms the importance of defining the costing methodology that the Commission will use to establish rates. Although virtually all of the 14 state commissions in U S WEST's region stated that they were following TELRIC to establish rates for the unbundled loop, there were nevertheless wide variations in the loop rates the commissions adopted, ranging from a low of $15.00 per month in Oregon to a high of $27.41 per month in Montana.[16] And, the end office switching minutes of use ("MOU") rate ranges from a low of $0.0011083 in New Mexico to a high of $0.00283 in Colorado[17] – a difference of more than 150%. While these variations are explained in part by

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[14] *See also Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393, 410-12 (5th Cir. 1999), *cert. granted sub nom., GTE Service Corp. v. FCC*, 2000 U.S. LEXIS 3778 (2000).

[15] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[16] Fleming Decl. ¶ 3.

[17] Fleming Decl. ¶ 3.

legitimate cost differences from one state to another, they also reflect differences in how state commissions define and apply TELRIC principles.

Different TELRIC cost models also produce vastly different results. For example, U S WEST's cost model and AT&T's HAI 5.0a cost model are both based on TELRIC methodology, but they produce vastly different results. For example, for an unbundled loop in Nebraska, U S WEST's model produced a rate of $27.78 per month, while AT&T's model produced a rate of $18.25 per month. Likewise, U S WEST's model produced an end office switching MOU rate of $0.00310, while AT&T model produced a rate of $0.002186.[18]

The Commission's failure to define a cost methodology in this case stands in contrast to its actions in the universal service docket. There, after receiving extensive comments from industry members, the Commission established detailed criteria for a cost model, adopted a model platform and selected specific input values to use in the model platform.[19] As the Commission implicitly recognized in the *Tenth Report and Order*, an estimate of the cost of providing telecommunications service is largely dependent upon the inputs that are included in the cost study. Cost estimates may vary dramatically depending, for example, on the values a study assigns to the cost of capital, overhead expenses, and depreciation lives. Equally important are assumptions about the construction practices that will be used to build a telephone network, such as the extent to which the telephone company shares the costs of placing network facilities with other utility companies, the techniques used to place outside plant, and the percentages of the different types of outside plant – aerial, buried, and underground – included in the network.

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[18] Fleming Decl. ¶ 4.

[19] *See Federal-State Joint Board on Universal Service*, Fifth Report and Order, CC Docket Nos. 96-45, 97-160, 13 FCC Rcd. 21323 (1998); *In the Matter of Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Tenth Report and Order, CC Docket Nos. 96-45 and 97-160, FCC 99-304 (rel. Nov. 2, 1999) ("*Tenth Report and Order*").

The *CALLS Order*, unlike the *Tenth Report and Order*, does not even identify the inputs and assumptions that the Commission deems important for a cost study, much less assign any values. The Commission provided only a single sentence that vaguely refers to "forward-looking economic costs."

Even where the methodology for a cost study has been established and defined, predicting the outcome of a study is still an uncertain exercise. Here, where the Commission has failed to define the methodology, a price cap LEC cannot predict outcomes with any degree of reliability and, therefore, cannot meaningfully evaluate the potential risks and benefits of opting out of CALLS. U S WEST should not be required to base its choice on a guess as to the cost study criteria the Commission will impose. The Commission should remedy the dilemma that U S WEST and the other price cap LECs face by providing a clear, detailed definition of the type of "forward-looking" cost study that the *CALLS Order* requires.

X-factor. The Commission's statement in the *CALLS Order* that it intends to apply an X-factor to the results of a forward-looking cost study raises two issues. First, if the Commission's use of the term "forward-looking economic costs" is intended to establish a least-cost pricing methodology, the use of an X-factor would be inappropriate. As the name implies, this methodology assumes the use of least-cost, forward-looking technologies in a telecommunications network and, therefore, assumes forward-looking increases in productivity. Because a least-cost approach assumes increases in efficiency and productivity, it would be duplicative to apply an X-factor that also assumes these increases. The *CALLS Order* fails to explain this important relationship between the cost-study methodology that a price cap LEC must follow and the appropriateness of an X-factor.

Second, even though the Commission apparently still intends to apply an X-factor to a least-cost pricing methodology, the *CALLS Order* inexplicably provides no information about

the level, basis or justification of this X-factor. In the *LEC Price Cap Order*,[20] the Commission selected an X-factor of 6.5%. The Court of Appeals for the D.C. Circuit reversed and remanded this decision on May 21, 1999, for further explanation by the Commission.[21] After well over a year, the Commission still has not provided that explanation. Indeed, it has not even decided what *methodology* to use to determine the X-factor. As a result, U S WEST has no idea what X-factor the Commission will attach to any cost study that U S WEST submits. U S WEST is entitled to know this X-factor before it is required to decide whether to opt into a cost proceeding in which the X-factor will be critical.

Price cap plan. Although the Commission says that a LEC's cost study will be made subject to a price cap plan, it does not suggest what kind of plan. This lack of definition deprives U S WEST of another piece of critical information required for an informed decision whether to participate in CALLS. Further, if the Commission is requiring a least-cost TELRIC approach to estimating costs, it is far from clear whether or how the results of a least-cost TELRIC study could serve as a price cap. The Commission must clarify this issue to allow a price cap LEC to understand the cost-based option.

The Commission's references to the *Access Charge Reform Order*[22] add nothing to these three key undefined elements. That order only said that price cap LECs must submit cost studies showing the forward-looking costs of providing interstate access services. It said nothing about what type of forward-looking cost model the Commission expected or what the Commission would do with these studies.[23]

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[20] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) ("*LEC Price Cap Order*").

[21] *USTA v. FCC, supra.*

[22] *See CALLS Order* ¶ 60.

[23] *Access Charge Reform Order* ¶ 267.

The *CALLS Order* requires that within 60 days from the release of the Order (that is, by July 30, 2000), U S WEST must make an election, binding for the five-year term of CALLS, between opting in or out of the CALLS proposal.[24] Thus, U S WEST must elect between two pricing alternatives, one which was the product of negotiations from which U S WEST was excluded, and the other which lacks even the most rudimentary description of the key mechanisms and values necessary to compare the two options. The Commission has presented U S WEST with a chimerical choice, which is really no choice at all.

If, as the Commission stated in the *CALLS Order*, it intends to provide a real, viable alternative to opting into CALLS, the Commission must define that alternative with sufficient clarity that U S WEST and others can understand this option and rationally compare it to the CALLS proposal. Offering U S WEST a "pig in a poke" is not a viable option, and attempting to force U S WEST to make an impossible choice is arbitrary, capricious and an abuse of discretion.

In analogous circumstances where an agency has failed to define a rule or regulation with adequate specificity, the D.C. Circuit has remanded the rule back to the agency for interpretation and clarification.[25] The court has explained that "the salutary and settled rule of administrative law is that the agency, and not the reviewing court, is to be accorded the first opportunity to construe its own regulations."[26] Thus, in one case, the court remanded the case because:

> there is the need for a clear and definitive interpretation of all agency rules so that the parties upon whom the rules will have an impact have

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[24] *CALLS Order* ¶ 61.

[25] *See, e.g., Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Comm'n*, 2000 U.S. App. LEXIS 11762 at *3 (D.C. Cir. 2000); *FTC v. Atlantic Richfield Corp.*, 567 F.2d 96, 103 (D.C. Cir. 1977).

[26] *FTC v. Atlantic Richfield*, 567 F.2d at 103.

> adequate and proper notice concerning the agency's intentions. Such a need is particularly acute with respect to those rules . . . the operation of which can serve to generate consequences of a deeply serious nature.[27]

Here, U S WEST's petition for a stay provides the Commission with an opportunity to clarify fundamental ambiguities in the *CALLS Order* before the D.C. Circuit reviews that order. This approach obviously is more efficient than clarifying after a remand and also is consistent with the rule that an agency, in the first instance, should construe its own rules and regulations. Indeed, if the Commission declines U S WEST's invitation to fill in the blanks in its cost-study alternative, it will be plain that the Commission never intended this to be a real alternative and functionally adopted the CALLS proposal as mandatory.

2. The *CALLS Order* violates the decision of the D.C. Circuit by failing to justify the 6.5% X-factor or, indeed, any X-factor.

The Commission selected an X-factor of 6.5% in the *LEC Price Cap Order*. Several entities filed petitions for review, and on May 21, 1999, the Court of Appeals for the D.C. Circuit reversed and remanded this decision for further explanation by the Commission.[28] The court flatly rejected the Commission's stated rationales for selecting 6.0% as the historical component of the X-factor, stating, "None of the reasons given for choosing 6.0% holds water."[29] In addition, the court remanded for explanation the Commission's choice of 0.5% as the customer productivity dividend ("CPD") component of the X-factor.[30] The court,

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[27] *Id.*

[28] *USTA v. FCC*, *supra*.

[29] *USTA v. FCC*, 188 F.3d at 525.

[30] *USTA v. FCC*, 188 F.3d at 527.

however, withheld issuance of its mandate through June 30, 2000, pending the Commission's reconsideration of the X-factor.[31]

The Commission itself has noted that the court did not find fault with the general methodology used by the Commission to set the X-factor, but rather with the Commission's selection of inputs.[32] As U S WEST suggested in its comments to the Commission in the remand proceedings, it would have been a relatively easy matter for the Commission to adjust these inputs and promulgate a revised X-factor or somehow try to justify its original one. Instead, the Commission issued an NPRM suggesting three alternative approaches for prescribing the X-factor, two of which involved an entirely different methodology, and invited comments on even more alternatives.[33]

Now, more than a year after the court's decision, the Commission still has not explained its rationale. For those LECs that might wish to opt out of CALLS, the Commission says only that it would set that LEC's rates at a level indicated by its cost study and make them subject to an "X-factor that we would determine."[34] The Commission did not take advantage of this opportunity to prescribe X-factors for both the period affected by the court's remand (July 1, 1997, to June 30, 2000) and the period from July 1, 2000, forward or a single X-factor to cover the combined period, as the Commission suggested in its *FNPRM*.[35]

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[31] *See USTA v. FCC*, Order, No. 97-1469 *et al.* (D.C. Cir. June 21, 1999); *USTA v. FCC*, Order, No. 97-1469 *et al.* (D.C. Cir. Apr. 13, 2000).

[32] Further Notice of Proposed Rulemaking in CC Docket No. 94-1 (*Price Cap Performance Review for Local Exchange Carriers*) and CC-Docket No. 96-262 (*Access Charge Reform*) FCC-99-345 (rel. Nov. 15, 1999) ("*FNPRM*") ¶ 25.

[33] *See FNPRM* ¶¶ 20-23.

[34] *CALLS Order* ¶ 59.

[35] *FNPRM* ¶ 2.

Its failure to do so suggests an unstated intent to use the *CALLS Order* to avoid the requirements of the court's order

To force U S WEST to choose an alternative with rates subject to an X-factor that the Commission has failed to represcribe – indeed, has failed to announce even the *methodology* that it will employ to represcribe – is a violation of both the letter and the spirit of the court's decision and the forbearance that it has shown the Commission over the past year. The effect of the Commission's order, whether intended or not, is to make it impossible for any LEC to rationally chose to opt out of the CALLS proposal. Should that result be obtained, the Commission will never have to set and properly justify an X-factor, as the court ordered.

B. Balance of Equities

As the Commission stated in its *Access Charge Reform Stay Order*, "We generally will stay the effectiveness of one of our orders if the party seeking such relief has shown that a balance of the relevant equities favors a retention of the status quo pending further consideration or judicial review."[36] Here, U S WEST seeks to retain the status quo in only one narrow respect, it seeks only to extend the 60-day deadline by which it must elect whether or not to participate in the CALLS proposal. Moreover, U S WEST seeks that stay only until the Commission properly defines the cost-study alternative to the CALLS proposal, as it must do to render that alternative viable.

Because U S WEST is obligated to operate under the CALLS terms for an interim period, granting this request for a stay will not affect implementation of the CALLS plan as set forth in the *CALLS Order*. The only impact of the stay will fall on the Commission, which will be required to designate a cost model and price cap plan, and justify and set an X-factor. If the Commission defines the undefined elements in the cost-study option, U S WEST will be able to make a reasoned election between two options. If U S WEST then elects to join

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[36] *Access Charge Reform Stay Order* ¶ 27.

CALLS, the CALLS plan will continue to proceed as before. Likewise, if U S WEST elects the cost-based option, U S WEST will submit its cost study (knowing which model it must use), for review by the Commission, and U S WEST will be entitled to a true-up if one is necessary to compensate U S WEST for the difference between the revenues received in the interim period and those it would have collected under the cost-based option.

Thus, even if the Commission grants the stay requested here, the CALLS plan will proceed just as the *CALLS Order* envisions. Any delay in U S WEST's submission of its cost study will be minimal or none at all if the Commission promptly defines the key elements of the cost-study alternative. But even a longer delay will not materially affect the overall CALLS plan, and the inconvenience to the Commission will be small compared to the importance of providing a fair choice on a question with multi-million dollar consequences.

To be clear, U S WEST does *not* seek a stay of that portion of the *CALLS Order* that requires it to comply with the rate-level components of the CALLS proposal on an interim basis, subject to true-up after it submits its cost study and the Commission has reviewed it. U S WEST already has filed tariffs in accordance with *CALLS Order* ¶ 268 to comply with the first year of the CALLS plan.

1. U S WEST will suffer irreparable harm absent a stay.

In offering U S WEST the choice of either submitting to CALLS or opting out into a cost-based regime, the Commission has offered a painful Hobson's choice: either submit to the known harm of operating under a CALLS plan negotiated by others and detrimental to U S WEST, or submit to an unknown and unknowable risk of operating under an undefined cost-based plan with potentially disastrous financial consequences. The Supreme Court has held that this kind of government conduct constitutes irreparable harm.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992), the Court held that the plaintiff had demonstrated irreparable harm by showing that state officers had made

clear that they would seek to enforce the challenged portions of a state statute that plaintiffs claimed had been preempted by federal law. The Court said:

> [Plaintiffs are] faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability, or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.[37]

Here, U S WEST faces a dilemma no less severe than that faced by the plaintiffs in *Morales*. The *CALLS Order* imposes on U S WEST an access charge pricing plan negotiated by others that causes the loss of millions of dollars in revenue. The purported alternative is undefined but also threatens an enormous revenue loss, the magnitude of which the *CALLS Order* conceals until after U S WEST has made its election.

The *CALLS Order* requires U S WEST to make a binding election by July 30, 2000, between the options of accepting the CALLS proposal and submitting a cost study. If U S WEST elects to reject CALLS in favor of submitting a cost study, and the Commission subsequently implements an unreasonable forward-looking cost model, X-factor or price cap plan, U S WEST could not change its election back in favor of CALLS. Instead, it must operate for years under the more onerous terms of the Commission's plan.

Thus, if U S WEST elects to reject CALLS and submit a cost study, the Commission would presumably go through the process necessary to provide key terms of that option, such as the forward-looking cost model, X-factor and price cap terms, that it failed to provide in the *CALLS Order*. Only then would U S WEST discover the economic consequences of its election. Thereafter, it would be forced to operate for five years under a plan that it would have never elected had the Commission defined key elements at the outset. This result would be unreasonable, arbitrary and unnecessary.

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[37] *Morales*, 504 U.S. at 382.

Moreover, the potential financial effect of these undefined variables is enormous. For example, each change of one percent in the X-factor translates into approximately $25 million of annual revenue to U S WEST [38] And, although U S WEST cannot calculate the financial impact of moving to forward-looking costs without knowing which model will be used, past experience with state-ordered UNE rates has shown that rates based on the anticipated FCC-prescribed TELRIC methodology will be much lower – possibly more than 50% lower – than U S WEST's current tariffed rates for interstate access services [39] A smaller revenue loss of 30% for interstate services would amount to more than $800 million per year [40]

Of course, U S WEST could challenge the Commission's subsequent determinations concerning the forward-looking costs model, X-factor and price-cap plan, and, if they were unlawful, could have them overturned. But, particularly in light of the strong deference that courts generally apply to Commission rulings relating to cost models and rates, the Commission could set a forward-looking cost model, X-factor and price cap plan that were harsh but not reversible on judicial review. In that event, U S WEST would be forced to live with rates and terms less favorable than those under CALLS, and it would have to do so because the Commission failed to properly define the elements of the cost study option in the *CALLS Order*. Neither the Commission nor a court can compensate U S WEST for losses resulting from opting into a cost-study alternative which, as a result of the Commission's *subsequent* definition of key terms, costs U S WEST millions of dollars in revenue as compared to the revenue it would have earned had it elected to participate in the CALLS proposal.

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[38] *See* note 10, *supra*.

[39] Fleming Decl. ¶ 5.

[40] Fleming Decl. ¶ 6.

As the Eighth Circuit said when it stayed the pricing provisions of the *Local Competition Order*,[41] "the threat of unrecoverable economic loss . . . does qualify as irreparable harm."[42] It is true, of course, that monetary loss generally does not constitute irreparable injury.[43] But that general rule applies only where "adequate compensatory or other corrective relief is available in the ordinary course of litigation."[44] Where, in contrast, monetary loss cannot be recovered, irreparable harm is present, and a stay is appropriate.[45]

Furthermore, an agency should grant a stay where the moving party is able to show the existence of "some cognizable danger" which is more than "a mere possibility."[46] This is precisely the case here.

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[41] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd. 15499, 15506-07 ¶ 5 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *on recon.*, 11 FCC Rcd. 13042 (1996), *on further recon.*, 11 FCC Rcd. 19738 (1996), *on further recon.*, 12 FCC Rcd. 12460 (1997), *further recons. pending*.

[42] *Iowa Utils. Bd. v. FCC*, 109 F 3d 418, 426 (8th Cir.), *motion to vacate stay denied*, 519 U.S. 978 (1996).

[43] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[44] *Id.* (*quoting Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

[45] *See Sunday School Bd. v. United States Postal Serv.*, No. 99-5018, 1999 U.S. App. LEXIS 11061, at *2 (D.C. Cir. April 30, 1999) (noting that economic loss may constitute irreparable harm where the alleged potential liabilities are unrecoverable).

[46] *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also United States v. Oregon Med. Society*, 343 U.S. 326 , 333 (1952) (injunctive relief is justified as long as a real threat of harm exists).

The fact that submitting a cost study is just one of two options cannot deprive U S WEST from obtaining a stay. The Eighth Circuit rejected a similar argument concerning the optional nature of proxy rates when it stayed the Commission's pricing rules for unbundled network elements.[47]

2. A stay would not harm others and would be in the public interest.

As discussed above, imposing the stay that U S WEST requests will not harm other parties or the public interest. For those LECs that have elected to submit a cost study rather than participate in CALLS, the *CALLS Order* still imposes the rate-level components of the CALLS proposal on an interim basis, subject to true-up.[48] Any delay in U S WEST's submission of a cost study while the Commission provides the key elements of the cost-based option would be imperceptible to the other CALLS participants and the public. The length of that potential delay is in the hands of the Commission and could be minimized if the Commission acts promptly. Thus, except for its effect on the Commission, a stay will have no effect on any other parties or the public.

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[47] *Iowa Utils. Bd. v. FCC*, 109 F.3d at 426.

[48] *CALLS Order* ¶¶ 57, 62.

CONCLUSION

WHEREFORE, U S WEST respectfully requests that the Commission:

(i) Stay the requirement in the *CALLS Order* ¶ 61 that U S WEST elect within 60 days from the date of issuance of the Order (or by July 30, 2000) whether to opt in or out of the CALLS proposal until 60 days after the Commission clarifies the forward-looking cost model, X-factor and price cap plan that it intends to apply to those LECs who choose not to subscribe to the CALLS proposal, and

(ii) Grant such other and further relief as the Commission deems just and proper.

Respectfully submitted,

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Attorneys for
U S WEST Communications, Inc.

June 27, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Low-Volume Long-Distance Users	)	CC Docket No. 99-249
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

DECLARATION OF GARRETT Y. FLEMING

I, Garrett Y. Fleming, declare the following:

1. My name is Garrett Y. Fleming and I am a Director in the Markets Pricing and Regulatory Strategy Group of the Retail Markets Organization of U S WEST Communications, Inc. ("U S WEST"). I am responsible for preparing all of U S WEST's forward-looking cost studies, including Total Element Long Run Incremental Cost ("TELRIC") studies used to set rates for unbundled network elements ("UNEs"), and I also work hand-in-hand with the U S WEST cost witnesses who support my cost studies in various state arbitrations and rate proceedings.

2. I have over 18 years of experience in the telecommunications industry with both U S WEST and the Colorado Public Service Commission. I have been in charge of the development of U S WEST's forward-looking cost models since 1995. Since adoption of the Telecommunications Act of 1996, I have been extensively involved in all aspects of U S WEST's TELRIC cost studies and its advocacy in state TELRIC cost

proceedings. As a result, I am very familiar with the TELRIC methodology and the rate variations it has produced in cost proceedings throughout U S WEST's fourteen-state region. I also have been involved in preparing other U S WEST forward-looking cost studies for various state cost proceedings.

3. Based on my experience, the application of a forward-looking cost methodology can produce significant variations in the resulting rates, depending on the inputs and assumptions that are used. This has proven to be the case with the TELRIC methodology. For example, state-ordered unbundled loop rates in U S WEST's region range from $15.00/month in Oregon to $27.41/month in Montana. The end office switching minutes-of-use ("MOU") rate ranges from $0.0011083 in New Mexico to $0.00283 in Colorado. In addition, the DS3 interoffice transport rate ranges from $256.13/month (plus $13.96 per mile for the 8-25 mileage band) in Colorado to $5,328.09/month in Iowa. In my opinion, with the exception of loop rates, virtually all of the variations are attributable to the states' application of the TELRIC methodology rather than to actual differences in costs.

4. Significant variations in outputs also have resulted from the use of different cost models which purport to follow the TELRIC methodology. For example, U S WEST's cost model and AT&T's HAI 5.0a cost model both purport to be based on the TELRIC methodology, but they produced vastly different results in states such as Nebraska. In the case of the unbundled loop, U S WEST's model produced a rate of $27.78/month, while AT&T's model produced a rate of $18.25/month. Likewise, U S WEST's model produced an end office switching MOU rate of $0.00310, while AT&T model produced a rate of $0.002186. For DS3 interoffice transport, U S WEST's

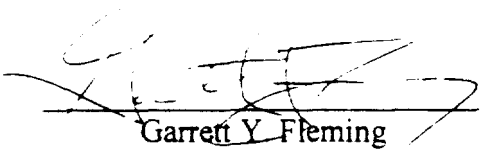
model produced a rate of $158.99/month (plus $13.09 per mile in the 8-25 mileage band), while AT&T's model produced a rate of $4,750.92/month. From these examples, it is apparent that the rate variations are more the result of different model inputs and assumptions, than a difference in costs.

5. Moreover, past experience with state-ordered UNE rates has shown that rates based on the anticipated FCC-prescribed TELRIC methodology will be much lower – possibly more than 50% lower – than U S WEST's current tariffed rates for interstate access services.

6. If the FCC were to apply a forward-looking cost methodology to U S WEST's interstate rates, the level of variations in outputs that have occurred in connection with the TELRIC methodology would have a tremendous revenue impact. U S WEST's total interstate revenue requirement for 1999 was $2,552,478,000 as reported in the 1999 ARMIS Report filed with the FCC. Therefore, a variation of 30% in U S WEST's interstate rates would be worth more than $800,000,000 to the company on an annual basis.

I declare under pain of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 26, 2000 in Denver, Colorado.

06/26/00
Date



Garrett Y. Fleming

CERTIFICATE OF SERVICE

I, Donald J. Friedman, hereby certify that on June 27, 2000, a copy of the foregoing Petition for Partial Stay and Declaration of Garrett Y. Fleming was served by messenger on the parties listed on the attached Service List.

Donald J. Friedman

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